HONORABLE RICARDO S. MARTINEZ

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Petitioner, v. MICROSOFT CORPORATION, *et al*. Respondents.	NO. 2:15-cv-00102 RSM **MOTION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*** **NOTED FOR CONSIDERATION:** November 11, 2016

Pursuant to Federal Rule of Civil Procedure 7(b) and the Court's inherent authority, the Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this Motion for leave to participate as *amicus curiae*. At this time, the Chamber specifically seeks leave to file the accompanying *amicus* brief in support of Microsoft's Brief Regarding Privileged Documents Still in Dispute, filed on September 12, 2016 (Dkt. # 140).

INTRODUCTION

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest federation of businesses and associations. It represents 300,000 direct members and indirectly represents the interests of more than three million U.S. companies and professional organizations of every size, in every industry sector, from every region of the

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country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the nation's business community.

The vast majority of these businesses seek tax advice from lawyers, accountants, or both, in reliance on the understanding that this advice will be privileged from disclosure to the IRS. If adopted by this Court, the extreme positions articulated by the government in its Response (Dkt. # 145) to Microsoft's Brief Regarding Privileged Documents Still in Dispute (Dkt. # 140) would significantly undermine the ability of businesses to prevent the disclosure of such tax advice. That, in turn, would chill businesses from obtaining and relying on the uninhibited advice of their tax advisors. The Chamber accordingly has a strong interest in this Court's consideration of the privilege and work product protection arguments in this case.

ARGUMENT

Under their inherent authority, federal district courts have broad discretion to grant leave to participate as *amicus curiae*. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *Skokomish Indian Tribe v. Goldmark*, No. 3:13-cv-5071, 2013 WL 5720053, at *1 (W.D. Wash. Oct. 21, 2013). An *amicus* brief is generally permitted when the *amicus* "has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Cmty. Ass'n for Restoration of Env't (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) (citing *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903)); *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 133 (3d Cir. 2002) (now Justice Alito stating that, when

deciding whether to allow participation as *amicus*, it is "preferable to err on the side of granting leave").

Petitioner the United States of America (the "government") misapprehends the types of tax and legal advice that businesses like Microsoft receive, and conflates two distinct types of advice that accountants provide—tax return preparation (not subject to privilege once a return is filed) and tax planning advice (subject to privilege and, frequently, also subject to work product protection). The government argues that routine tax planning advice should not be protected under the tax practitioner privilege, I.R.C. § 7525, which extended the attorney-client privilege to non-lawyer tax advisors, because this advice either (1) is not tax advice within the scope of the statute, or (2) should fall within the statute's "tax shelter promotion" exception. Under the government's view, only *post hoc* tax analysis of a transaction would be privileged. These arguments cannot be reconciled with I.R.C. § 7525 and its underlying policy purposes nor are these arguments supported by Ninth Circuit precedent.

Protection from disclosure "encourage[s] full and frank communication between [tax advisors] and their clients and thereby promote broader public interests in the observance of [tax] law . . ." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). In order to serve these interests "the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected [because a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 393; *see also Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

In 1998, Congress determined that these same principles should apply to communications between taxpayers and federally authorized tax practitioners. The government's position cannot

be reconciled with these important policy goals. Most importantly, if the government's arguments are adopted by this Court, the future application of I.R.C. § 7525 would be burdened by increased uncertainty, threatening to make it little better than if Congress never intended to extend privilege to communications between taxpayers and tax advisors. The government also advances arguments challenging the application of the work product doctrine. The Ninth Circuit has already addressed and rejected similar arguments.

The issues and policy implications of this case are deeply concerning to the Chamber and its members, and the Chamber is uniquely situated to address the government's arguments. Indeed, the government's arguments appear to be premised upon a misunderstanding of how large multinational companies like Microsoft receive tax advice in the context of cost-sharing arrangements and, more generally, transfer pricing. The Chamber and the businesses it represents have singular experience and insight to offer in this area.

CONCLUSION

Businesses need the ability to consult with advisors—through full and frank discussions—without fear of those communications being disclosed to an adversary. The implications of any dilution of the attorney-client privilege, the tax practitioner privilege, and the work product doctrine are of the utmost importance to the business community represented by the Chamber. For these reasons, the Chamber respectfully requests the opportunity to participate

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as *amicus curiae* and requests leave to file the accompanying brief.[1] The Chamber's proposed brief is submitted with this Motion.

Dated October 27, 2016.

Respectfully submitted,

By: *s/ Timothy J. O'Connell*
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[1] This Court has "no particular local rules governing when an *amicus curiae* must file its brief in response to a motion of one of the parties." *Skokomish*, 2013 WL 5720053, at *2. The Chamber is addressing arguments made for the first time by the government in its Response to Microsoft's Regarding Privileged Documents Still in Dispute (Dkt. # 140). The Chamber has attempted to conform its Motion and accompanying brief to the Court's rules, in particular LCR 7(d)(3). To the extent the Court would prefer that the Motion or accompanying brief follow a different format or structure, the Chamber respectfully requests leave to amend.

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties who have appeared in this case.

DATED: October 27, 2016 at Seattle, Washington.

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